(2)

Supreme Court, U.S.
FILED
JAN 12 2005
OFFICE OF THE CLERK

No. 04-251

In the Supreme Court of the United States

NEGUSSU DEMISSIE AND KIRUBEL NEGUSSU,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioners have identified any issue regarding the denial of their request for asylum and withholding of removal that warrants review by this Court.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 12

TABLE OF AUTHORITIES

Cases:

INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 8, 9
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 2
INS v. *Stevic*, 467 U.S. 407 (1984) 3
R-, In re, 20 I. & N. Dec. 621 (BIA 1992) 7
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 11

Statutes and regulations:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, 110 Stat. 3009-546:
§ 305, 110 Stat. 3009-602 2
§ 309(a), 110 Stat. 3009-625 3
§ 309(c), 110 Stat. 3009-625 3
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1158(b) (2000 & Supp. I 2001) 2
8 U.S.C. 1158(b)(2)(A)(iii) 2
8 U.S.C. 1231(b)(3) 2
8 U.S.C. 1231(b)(3)(A) 2

Statutes and regulations—Continued: Page

8 U.S.C. 1231(b)(3)(B)(iii) 3
8 U.S.C. 1253(h)(2)(C) 8
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 2
8 C.F.R.:
Section 208.13(a) 2
Section 208.16(b) 3

In the Supreme Court of the United States

No. 04-251

NEGUSSU DEMISSIE AND KIRUBEL NEGUSSU,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is *available in* 89 Fed. Appx. 394. The decisions of the immigration judge (Pet. App. 8-20) and the Board of Immigration Appeals (Pet. App. 4-7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2004. A petition for rehearing was denied on May 11, 2004 (Pet. App. 21). The petition for a writ of certiorari was filed on August 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States. 8 U.S.C. 1158(b) (2000 and Supp. I 2001). An alien seeking asylum bears the burden of establishing that he is a refugee and must demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987); 8 C.F.R. 208.13(a). An alien is ineligible for asylum if "there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii).

In addition, "if the Attorney General decides that the alien's life or freedom would be threatened" in the country of deportation "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the Attorney General generally "may not remove" the alien to that country. 8 U.S.C. 1231(b)(3)(A).[1] To be entitled to withholding of

---

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, § 305, 110 Stat. 3009-602, substantially revised the provisions regarding withholding of removal, which are now codified at 8 U.S.C.

removal under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding). Removal may not be withheld, however, in the case of a person believed to have committed a "serious nonpolitical crime" outside the United States prior to his arrival in the United States. 8 U.S.C. 1231(b)(3)(B)(iii).

2. Petitioner Demissie and his son, petitioner Negussu, are natives and citizens of Ethiopia, where they were members of the Amharic tribe. Pet. App. 8-9. Petitioners entered the United States on July 27, 1997, as nonimmigrant visitors, and they remained in the United States beyond the January 26, 1998, expiration date of their authorized visit. *Ibid.* In 1998, petitioners were placed in removal proceedings, and they applied for asylum, withholding of removal, and voluntary departure. *Id.* at 9; R. 88-92, 230. Petitioner Negussu's claim for relief is wholly derivative of his father's claim. Pet. App. 4 n.1.

3. a. In removal proceedings before the immigration judge, petitioner Demissie testified that he was a logistic and supply officer in the Ethiopian armed forces under the Mengistu regime. Pet. App. 9. Demissie further testified that in 1991, after Mengistu, who was ethnically Amharic, was replaced by the Ethiopian People Revolutionary Democratic Front (EPRDF), a party dominated by ethnic Tigreans, Demissie was detained and interrogated for three months after the new government ordered all army officers to report to designated bases.

1231(b)(3). IIRIRA governs the present case because its provisions apply to aliens who are placed in proceedings on or after April 1, 1997. IIRIRA Tit. III, Subtit. A, § 309(a) and (c), 110 Stat. 3009-625.

Id. at 9-10. He further testified that, after agreeing to train EPRDF officers, he was released and assured pension payments. *Id.* at 10. He testified that he was subsequently fired after he refused to join the Amharic wing of the EPDRF. *Ibid.*

Shortly thereafter, Demissie joined the Kefagne Ethiopian Patriotic Front (Kefagne), an outlawed group fighting the EPRDF. Pet. App. 10. Kefagne opposes EPRDF's policy of taking land from the farmers and giving it to Tigreans, and it "attacks government individuals using guerrilla tactics and other means (including shooting down a government helicopter, in one incident described by [Demissie]) to prevent the government from carrying out its policy." *Ibid.* Demissie testified that he joined the Kefagne because he disagreed with the ruling party's attempt to divide Ethiopia by ethnicity. R. 113, 116. He supported the armed struggle of the Kefagne movement, and believed that armed resistence was a legitimate response to the actions of the government. Pet. App. 25, 28; R. 137-138. Demissie claimed that "[w]e are engaged in guerrilla fighting as well to stop the land being taken away by the Tigrean." R. 151. Although Demissie testified that he never personally engaged in armed fighting or terrorist acts, he admitted recruiting individuals to join the Kefagne forces that were engaged in fighting against the government. R. 138, 148, 176.

These activities led to his second arrest by EPRDF. Demissie claimed that in January 1995 he was once more recruited by the EPRDF to train new recruits. Pet. App. 25. A month after declining EPRDF's request, he was arrested by EPRDF security forces and detained for seven months. Pet. App. 26; R. 124-125. He testified that during this time, he was repeatedly interrogated

and beaten in order to disclose his Kefagne affiliation and the names of Kefagne members. R. 124-125. He testified that, during this questioning, he falsely denied involvement with Kefagne because he feared being killed. R. 124. He was released on bail in September 1995, but was informed that the public prosecutor's office would continue the investigation into his activities. Pet. App. 26-27. The prosecutor's office questioned him twice in the following two months and informed him that he had committed a "serious political crime." *Id.* at 27; see R. 125-126.

Petitioner Demissie testified that, in September 1996, he was assigned by Kefagne to take ten new ex-army officers to Gondar, where they were to join the Kefagne forces. R. 149. In Gondar, government forces arrested the Kefagne recruits, but Demissie managed to escape. Pet. App. 27. He testified that he understood that the recruits were interrogated, beaten, and shot by the military. R. 128. Petitioner Demissie stayed at the house of a friend for the next ten months, during which time he learned from his wife that the army had questioned her regarding his whereabouts. R. 128-129. The Kefagne subsequently helped him leave Ethiopia because he was afraid of being killed. R. 129, 133. He testified that he has since learned that officials ransacked his home in Ethiopia and threatened his wife. R. 132-133. He believes that he would be imprisoned and killed if he returns to Ethiopia. R. 133-134.

b. The immigration judge denied petitioners' application for asylum and withholding of removal because Demissie "does not appear to have been persecuted or have a well-founded fear of persecution" within the meaning of the immigration laws. Pet. App. 17. The immigration judge found that the government of

Ethiopia was trying to defend itself from the "violence and guerrilla tactics" of the Kefagne, which opposes the government's land policy. *Id.* at 17-18. He reasoned that "[a] duly constituted and functioning government of a country has a legitimate right to protect itself against persons who seek its overthrow," and that "[s]uch a government has a legitimate right to investigate and detain individuals suspected of aiding or being a member of an organization that seeks to overthrow it." *Id.* at 17. The immigration judge further found that Demissie had been arrested and held for prosecution for violating laws applicable to the population as a whole, rather than persecuted for his political opinion. *Id.* at 18. He found "no indication that the government cared about [Demissie's] individual political opinion" nor was hostile to his Amharic ethnicity, noting that it had offered him a "position with the military and pressured him to join the Amharic wing of the EPRDF." *Id.* at 19. For the same reasons, the immigration judge denied petitioners' application for withholding of removal, reasoning that, because Demissie failed to demonstrate a well-founded fear of persecution, he could not meet the "higher standard of proof of clear probability of persecution" required to establish eligibility for withholding. *Id.* at 20.

4. The Board of Immigration Appeals (Board) affirmed for the reasons given by the immigration judge. Pet. App. 4-7. The Board rejected petitioners' argument that Demissie's fear of future arrest and detention for possible prosecution for his participation in the Kefagne constitutes a well-founded fear of persecution. The Board reasoned that the government of Ethiopia, as a sovereign nation, has a legitimate right to investigate and detain persons suspected of aiding or belonging to

an organization that seeks its overthrow. *Id.* at 5 (citing *In re R-*, 20 I. & N. Dec. 621 (BIA 1992)). The Board noted Demissie's 1995 arrest for his suspected recruitment of former army officers to the Kefagne, as well as his narrow escape from arrest in 1996 when he "was taking ten new [Kefagne] recruits * * * to join the Kefagne as either fighters or in another capacity." *Ibid.* Under these circumstances, the Board concluded, "the Ethiopian government's supposed interest in the prosecution of [Demissie] for his participation in the attempt to overthrow a lawfully constituted government does not constitute persecution within the meaning of the [Immigration and Nationality] Act." *Id.* at 6. The Board observed that punishment for participation in a coup may constitute persecution where a coup is the only available means of effecting political change, but the Board concluded that the fair and free election of the Government of the Federal Democratic Republic of Ethiopia in 1995 demonstrated that "there are other peaceful means to effect political change in Ethiopia, which the [Kefagne] has rejected." *Ibid.* Accordingly, the Board concluded that petitioners failed to meet the burden of proof with respect to their claim for asylum or the higher burden of proof required for eligibility for withholding of removal. *Id.* at 6-7.

5. The court of appeals unanimously denied petitioners' petition for review in an unpublished per curiam opinion. Pet. App. 1-3. The court noted that, "[r]ather than challenging the merits of the Board's decision on appeal, the Petitioners contend that the Board erroneously failed to address one of their issues, testimony, and much documentation of record, in violation of their due process rights." *Id.* at 2. The court rejected that argument, finding that the "Board need not . . . write

an exegesis on every contention. What is required is merely that it consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Id.* at 2 (internal quotation marks omitted). Applying this standard, the court found "the Board's opinion to be more than adequate to satisfy due process." *Ibid.*

ARGUMENT

Petitioners argue (Pet. 5-20) that the decision of the court of appeals conflicts with *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), which interpreted the "serious nonpolitical crime" exception to withholding of removal. But none of the decisions below turned on that exception, and the issues petitioners raise in this Court were neither presented to nor passed upon by the court of appeals. The unpublished decision of the court of appeals does not warrant this Court's review.

1. In *Aguirre-Aguirre*, this Court interpreted former 8 U.S.C. 1253(h)(2)(C), which provided that an alien who had committed a "serious nonpolitical crime" was ineligible for withholding of deportation. 526 U.S. at 418. Petitioners argue that the decision of the court of appeals is in conflict with that decision, and, more generally, that the decisions below misapplied the "serious nonpolitical crime" exceptions to asylum and to withholding of removal. See Pet. 5-20. Petitioners are mistaken. The rulings below did not turn on, or even address, the question whether petitioner Demissie committed a serious nonpolitical crime. Rather, petitioners were denied asylum and withholding of removal because petitioners failed to meet their burden of proof on the first step of the respective analyses of eligibility for

asylum and for withholding of removal: that petitioner Demissie was subjected to past persecution or faced a well-founded fear of future persecution, or that he faced a "clear probability of persecution." Pet. App. 5-7; *id.* at 16-20. Those conclusions do not conflict with *Aguirre-Aguirre*, which expressly did not address the question whether the alien would be subject to persecution. 526 U.S. at 418 ("The issue in the case is not whether the persecution is likely to occur."); *id.* at 422 ("[T]he BIA did not decide whether [Aguirre-Aguirre] had established the requisite risk of persecution because it determined that, in any event, he had committed a serious nonpolitical crime.").

Moreover, the issue the immigration judge and the Board did decide—that petitioners failed to prove a well-founded fear of persecution—would not warrant this Court's review even if petitioners challenged it here, because it involves only a largely factbound application of legal principles that are established in Board precedent and that petitioners do not challenge here. Weighing the evidence, the immigration judge found that petitioners failed to meet their burden of proof for two reasons. First, the immigration judge found that petitioner Demissie experienced arrest and detention for possible prosecution for violation of laws of general applicability based on the violent activities of the Kefagne, not persecution based on his political opinion or ethnicity. The immigration judge found that "the government of Ethiopia is trying to defend itself from Kefagne," which is protesting the government's land policy "with violence and guerrilla tactics," and that Demissie "was detained because he was helping a violent group that is fighting the government." Pet. App. 17-18. Second, the immigration judge found that Demissie

failed to establish the requisite causal connection between his treatment by the government and his political opinion or ethnicity. The judge found "no indication" that the government "cared about [Demissie's] individual political opinion" or that it was hostile to his Amharic ethnicity when the government "offered [Demissie] the position with the military and pressured him to join the Amharic wing of the EPRDF." *Id.* at 19.

The Board agreed with the reasoning of the immigration judge, and made additional observations pertaining to the authority of a sovereign nation to protect itself from persons who engage in armed struggle against it. Pet. App. 5-6. For example, the Board relied upon a report from the State Department, which concluded that the 1995 elections in Ethiopia were "free and fair although some irregularities were noted." *Id.* at 6; see *id.* at 5 ("The record reflects the [Kefagne] consists of disgruntled former soldiers in the Gondar region of Ethiopia who have refused to relinquish armed struggle in support of their aims and carry on sporadic ambushes on Ethiopian government forces.").

These factbound determinations are supported by substantial evidence and raise no issues warranting the Court's review.

2. The petition should be denied for the further reason that the arguments petitioners now make were neither pressed in nor passed upon by the court of appeals. On petition for review in that court, petitioners sought review only of the question "[w]hether the Board violated due process when (1) it failed to adjudicate one of Mr. Demissie's issues on appeal, and (2) it failed to consider meaningfully both Mr. Demissie's probative testimony and also much of the documentation of record which supported Mr. Demissie's claims to relief." Pet.

C.A. Br. 2. In its decision, the court of appeals rejected only those arguments, and petitioners do not contend that the court's rejection of those arguments conflicts with the decision of any court. By contrast, the court of appeals did not pass on the merits-based assertions petitioners raise in this Court,[2] which in any event are tied to his arguments relying on *Aguirre-Aguirre* and the serious nonpolitical crime exception that were not the basis for any of the decisions below. See Pet. 13, 17-19. The court of appeals' failure to address those issues is not surprising, given that petitioners' reply brief in the court of appeals expressly disclaimed any request that the court determine "whether the Board's decision might ultimately be correct." Pet. C.A. Reply Br. 12; *id* at 11 ("He asks only that the Court remand his case to the Board with instructions that (1) the Board adjudicate all arguments he raised before it, and (2) the Board meaningfully consider all probative evidence which he placed on the record in support of his applications for asylum and withholding of removal. He no longer asks that the Court find that he suffered past persecution."). Petitioner has provided no reason why this Court should depart from its usual practice of not considering arguments that were neither pressed in nor passed upon by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

---

[2] For example, the court of appeals did not, as petitioners suggest (Pet. i), "mischaracteriz[e] ethnically motivated land appropriation as the legitimate exercise of authority by majority ethnic Tigreans," or find that the "Kefange * * * was attempting to overthrow the government."

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

JANUARY 2005